

TUESDAY, JULY 31, 2001

The Board met at its offices at 450 N Street, Sacramento, at 9:45 a.m. Chairman Parrish, Vice Chairman Chiang, Mr. Klehs and Mr. Andal and present, Ms. Mandel present on behalf of Dr. Connell in accordance with Government Code Section 7.9.

Mr. Parrish stated today's meeting of the Board of Equalization is held in honor of and in memorial to, former Board Member Richard "Dick" Nevins, who passed away on July 29, 2001.

Mr. Klehs stated "Mr. Nevins served the Board for more than 28 years, serving longer than any other Member, other than possibly George Reilly. It is with regret and sorrow I learned of his passing. He was 80 years old and died following a bodysurfing accident. Not many people at his age are this adventurous but he was. To his wife, Mary Lois and his family, our deepest sympathy."

Mr. Chiang stated "Mr. Nevins major accomplishment was Senior Citizen Property Tax Assistance Law enacted in 1967, augmented in 1976 and given an increase in the final 2001-2002 State Budget. The State of California and we, the Board, should thank him for his incredible serve to all of us."

Mr. Parrish stated "It was my pleasure to meet Mr. Nevins for the first time in 1986. He had a very lustrous career with the Board, at one time he even defeated Howard Jarvis in a campaign. Mr. Nevins, also as myself, was a coin collector. He accomplished a great deal in this term of office, so of course it is with regret and sadness I heard of his passing."

Mr. Andal stated "Given Mr. Nevins long tenure with the Board, there is no doubt significant accomplishments and history that was created along the way. I would request of staff to capture his accomplishments and his contribution to the Board as well as the State of California in a memorandum. I think it would be valuable to the Board's historical record, as well of interest to his family." (Exhibit 7.11)

Mr. Parrish requested a moment of silence in memory of former Board Member, Mr. Richard "Dick" Nevins.

Exhibits to these Minutes are incorporated by reference.

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CORPORATE FRANCHISE AND PERSONAL INCOME TAXES HEARINGS

Donald C. Marro & Lillian S. Clancy, 83206

1993, \$4,495.00 Assessment

1994, \$4,772.00 Assessment

For Appellant:

Donald C. Marro

For Franchise Tax Board:

Jean Cramer, Supervising Tax Counsel

Contribution Disclosures pursuant to Government Code Section 15626: No contributions were disclosed.

Issues: Whether respondent is barred by the statutes of limitations from making deficiency assessments.

Whether appellants have shown that respondent's proposed assessments, based on federal changes, are incorrect.

Whether appellants have shown that respondent should be equitably estopped from enforcing the proposed deficiency assessments.

Appellant's Exhibit:

Oral Argument Summary (Exhibit 7.12)

Hearing Summary (Exhibit 7.13)

Respondent's Exhibit:

IRS Form 1040 (Exhibit 7.14)

Action: Upon motion of Mr. Klehs, seconded by Mr. Chiang and unanimously carried, Mr. Parrish, Mr. Chiang, Mr. Klehs, Mr. Andal and Ms. Mandel voting yes, the Board ordered that the appeal be submitted for decision.

Michael D. & Eli Ronnie Goldfield, 48989

1986, \$51,829.00 Claim for Refund

For Appellant:

No Appearance

For Franchise Tax Board:

Suzanne Small, Tax Counsel

Action: The Board took no action.

OMH, Inc., 90784

1995, \$129,186.93 Assessment

Michael S. & Judy L. Ovitz, 90784

1994, \$754,947.00 Assessment

Robert F. & Janice R. Goldman, 90784

1994, \$ 36,101.00 Assessment

Ronald M. Meyer & Kelly R. Chapman, 90784

1994, \$310,552.00 Assessment

William M. & Carole L. Haber, 90784

1994, \$223,631.00 Assessment

Raymond & Lynette A. Kurtzman, 90784

1994, \$11,388.00 Assessment

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Stanley & Audri I. Tendler, 90784

1994, \$163,126.00 Assessment

Leon J. Condon & Estate of Joan J. Condon, Deceased, 90784

1994, \$114,545.00 Assessment

Lance A. & Karyn B Tendler, 90784

1994, \$ 7,001.00 Assessment

Morris H. Levitt & Estate of Faye H. Levitt, Deceased, 90784

1994, \$ 5,895.00 Assessment

Jerome & Linda Janger, 90784

1994, \$ 921.00 Assessment

Pat Goldberg, Custodian for Brandon Goldberg, 90784

1994, \$ 848.00 Assessment

Heather M. Goldberg, 90784

1994, \$ 782.00 Assessment

J.H. Rowland Perkins II & Sallie Perkins, 90784

1994, \$ 11,829.00 Assessment

For Appellant:

Rex Halverson, Representative

Michael Dreyer, Witness

For Franchise Tax Board:

Renel Sapiandante, Tax Counsel

Contribution Disclosures pursuant to Government Code Section 15626: No contributions were disclosed.

Issue: Whether the agreed upon reduction in the principal amount due under a nonrecourse debt to a third-party lender constitutes cancellation of debt income to appellants, which is includible in appellants' gross income, or whether such reduction constitutes a purchase price adjustment, which is not includible in appellants' gross income.

Appellant's Exhibit: Picture of Hotel Lobby (Exhibit 7.15)

Action: Upon motion of Mr. Andal, seconded by Mr. Klehs and unanimously carried, Mr. Parrish, Mr. Chiang, Mr. Klehs, Mr. Andal and Ms. Mandel voting yes, the Board ordered that the appeal be submitted for decision.

Wayne M. Fischer, 94355

1994, \$16,506.96 Claim for Refund

For Appellant:

Wayne M. Fischer

For Franchise Tax Board:

Craig Scott, Tax Counsel

Contribution Disclosures pursuant to Government Code Section 15626: No contributions were disclosed.

Issue: Whether appellant's claim for refund is barred by the applicable statute of limitations.

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Action: Upon motion of Mr. Andal, seconded by Mr. Chiang and unanimously carried, Mr. Parrish, Mr. Chiang, Mr. Andal and Ms. Mandel voting yes, Mr. Klehs absent, the Board ordered that the appeal be submitted for decision.

The Board recessed at 11:50 a.m. and reconvened at 2:00 p.m. with Mr. Parrish, Mr. Chiang, Mr. Klehs, Mr. Andal and Dr. Connell present.

2001 – 2002 PRIVATE RAIL ROAD CAR TAX RATE

Upon the motion of Mr. Andal, seconded by Dr. Connell and unanimously carried, Mr. Parrish, Mr. Chiang, Mr. Klehs, Mr. Andal and Dr. Connell, the Board adopted a rate for the 2001-2002 private railroad car tax of 1.066 percent (Exhibit 7.16).

ADOPTION OF THE 2001 STATE ASSESSED PROPERTY ROLL

Upon the motion of Mr. Andal, seconded by Mr. Parrish and unanimously carried, Mr. Parrish, Mr. Chiang, Mr. Klehs, Mr. Andal and Dr. Connell voting yes, Mr. Chiang not participating in *McLeod USA Telecommunications Services, Inc.*, 7785, Dr. Connell not participating in *AT & T Communications, 2310 and Global Photon Systems, Inc.*, 7794, the Board adopted the 2001 State Assessed Property Roll (Exhibit 7.17), excluding *Global Crossing North American Networks, Inc.*, 7536.

Upon the motion of Mr. Andal, seconded by Mr. Parrish and unanimously carried, Mr. Parrish and Mr. Andal voting yes, Mr. Klehs abstaining, Mr. Chiang and Dr. Connell not participating, the Board adopted the 2001 State Assessed Property Roll on *Global Crossing North American Networks, Inc.*, 7536.

ADOPTION OF THE 2001 PRIVATE RAILROAD CAR ROLL

Upon the motion of Dr. Connell, seconded by Mr. Klehs and unanimously carried, Mr. Parrish, Mr. Chiang, Mr. Klehs, Mr. Andal and Dr. Connell voting yes, the Board adopted the 2001 Private Railroad Car Roll (Exhibit 7.18).

Ms. Mandel entered the Boardroom to be present on behalf of Dr. Connell in accordance with Government Code Section 7.9.

CORPORATE FRANCHISE AND PERSONAL INCOME TAX APPEALS HEARINGS

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David Schultz, 92197

1998, \$4,924.50 Assessment, \$1,231.50 Penalty, Notice and Demand

\$1,231.00 Penalty, Late Filing

\$ 69.00 Filing Enforcement Fee

For Appellant:

David Schultz

For Franchise Tax Board:

Suzanne Small, Tax Counsel

Contribution Disclosures pursuant to Government Code Section 15626: No contributions were disclosed.

Issues: Whether appellant has met his burden to prove error in the proposed assessment.

Whether respondent is estopped from asserting all or a portion of the proposed assessment against appellant.

Whether the notice and demand or late filing penalties were properly assessed, and whether appellant has shown reasonable cause for relief.

Appellant's Exhibit: 1998 Tax Return (Exhibit 7.19)

Respondent's Exhibit: Declaration of Mary Yessen (Exhibit 7.20)

Action: Upon motion of Mr. Andal, seconded by Mr. Klehs and unanimously carried, Mr. Parrish, Mr. Chiang, Mr. Klehs, Mr. Andal and Ms. Mandel voting yes, the Board ordered that the appeal be submitted for decision; granting the Franchise Tax Board 30 days to review the 1998 Tax Return and the filing history of the Appellant. The Appeals Section 30 day thereafter to bring the matter back to the Board with a final recommendation.

Mr. Andal offered a substitute motion that the appeal be submitted for decision; granting the Franchise Tax Board 30 days to review the 1998 Tax Return and the filing history of the Appellant, the Appellant 30 days to review the Franchise Tax Board's reply, and the Appeals Section 30 day thereafter to bring the matter back to the Board with a final recommendation. The motion was seconded by Mr. Klehs and unanimously carried, Mr. Parrish, Mr. Chiang, Mr. Klehs, Mr. Andal and Ms. Mandel voting yes.

OCAT, Inc., 88699

1994, \$ 8,069.89 Assessment

\$23,003.76 Assessment

\$18,929.46 Assessment

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J. Allen & Carol A. Beebe, 88463

1994, \$196,480.00 Assessment

1996, \$ 43,728.00 Assessment

For Appellant:

No Appearance

For Franchise Tax Board:

Renel Sapiandante, Tax Counsel

Action: The Board took no action.

Raymond H. & Margaret R. Berner, 88344

1986, \$ 95,691.00 Assessment, \$23,922.75 Penalty, Failure to File

1987, \$313,694.00 Assessment, \$78,423.50 Penalty, Failure to File

1988, \$ 49,672.00 Assessment, \$ 3,932.90 Penalty, Negligence

For Appellant:

Joseph Vinatieri, Attorney

Richard Dewberry, Attorney

Margaret Berner

Tracey Street, Witness

Ronald D. Ailing, Witness

For Franchise Tax Board:

Natasha Sherwood Paige, Tax Counsel

Terry Collins, Supervising Tax Counsel

Contribution Disclosures pursuant to Government Code Section 15626: No contributions were disclosed.

Issue: Whether appellants were residents of California during 1986, 1987, and 1988.

Whether the Board is bound by its prior decision with regard to appellants' domicile – concerning the five tax years immediately preceding the years in issue.

Whether the notice and demand penalties and negligence penalty should be abated.

Respondent's Exhibit:

Flow Chart – CA Residency (Exhibit 7.21)

Action: Mr. Klehs moved to grant the appeal as to the Tax Year 1987. No vote was taken.

Mr. Andal offered a substitute motion to grant the appeal. Ms. Mandel seconded the motion and unanimously carried Mr. Parrish, Mr. Chiang, Mr. Klehs, Mr. Andal and Ms. Mandel voting yes.

Lewis Seiler & Abigail Montgomery, 88566

1994, \$56,594.00 Assessment

For Appellant:

Woodford G. Rowland, Attorney

For Franchise Tax Board:

Natasha Sherwood Paige, Counsel

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Contribution Disclosures pursuant to Government Code Section 15626: No contributions were disclosed.

Issue: Whether appellants have met their burden to prove that appellant-husband materially participated in operating the Running Elk Ranch, so as to qualify that as a nonpassive activity, and the farm losses claimed by appellants as ordinary, nonpassive losses.

Appellant's Exhibit: Declaration of Lewis Seiler (Exhibit 7.22)

Action: Upon motion of Mr. Klehs, seconded by Mr. Andal and duly carried, Mr. Parrish, Mr. Chiang, Mr. Klehs and Mr. Andal voting yes, Ms. Mandel voting no, the Board ordered that the appeal be granted.

Stephen & Suzanne Diamond, 99A-0150; 89002467110

1993, \$247,734.00 Assessment

For Appellant:

Stephen Diamond

Ali Farhat, Representative

Roxanne Lawe, Representative

For Franchise Tax Board:

Brad Heller, Tax Counsel

Kent Summers, Tax Counsel

Contribution Disclosures pursuant to Government Code Section 15626: No contributions were disclosed.

Issues: Whether appellants have shown that their losses attributable to "retired option payments" and "retired development costs" were properly deductible in 1993 rather than in 1992.

Whether appellants have shown that the federal definition of adjusted gross income is properly used in applying Revenue and Taxation Code section 17077.

Appellant's Exhibit:

Declaration of Thomas C. Hix (Exhibit 7.23)

Declaration of A. Philip Cheresch (Exhibit 7.24)

Release (Exhibit 7.25)

Agreement (Exhibit 7.26)

Budget (Exhibit 7.27)

Newspaper Article (Exhibit 7.28)

Resolution No. 18 – 93 (Exhibit 7.29)

Form (Exhibit 7.30)

1993 Federal Income Tax Statement (Exhibit 7.31)

FTB 3805V (Exhibit 7.32)

Action: Upon motion of Mr. Andal, seconded by Mr. Chiang and unanimously carried, Mr. Parrish, Mr. Chiang, Mr. Andal and Ms. Mandel voting yes, Mr. Klehs not participating, the Board ordered each party to file a brief with the Board, with a copy to the other party, within 30 days of the date of this hearing. Thereafter, each party will be

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granted an additional 30 days to respond to the other party's answers. Appeals Section shall then have 30 days to provide the Board with a summary of the parties' submissions.

The briefs should address in depth the following questions:

1. Whether West Dublin (WDP) should be treated, for tax purposes, as a continuation of Eden Development Partners I (Eden) such that the tax attributes of Eden for 1992 (i.e., losses for "retired options payments" and "retired development costs") should be attributed to WDP for that year and then carried forward to the appeal year. Among the evidence that the taxpayers should produce as part of their briefing is the partnership agreement for Eden.
2. Is there any evidence that the options owned by Eden during 1992 did not lapse and were transferred to WDP?
3. The parties should brief whether, if the "retired development cost" are properly attributable to WDP for tax purposes, such costs are properly capitalized under Internal Revenue Code (IRC) section 263A even though the costs were incurred before options to purchase the underlying land were exercised
4. Franchise Tax Board (FTB) should address fully whether R&TC section 17024.5(h) mandates that, for California purposes, adjusted gross income under IRC section 68 refers to federal adjusted gross income and not to any modified California definition of adjusted gross income. If FTB does not concede that section 17024.5(h) is controlling, the parties should brief the issue of whether adjusted gross income in IRC section 68 refers to federal adjusted gross income or a modified California definition of adjusted gross income. The parties should illustrate the results under IRC section 68 using federal adjusted gross income and then using the modified California definition of adjusted gross income.

BUSINESS TAXES APPEALS HEARINGS

Olga M. & Santos Salinas, SR ARF 22-800863; 89000381900
1-1-95 to 12-14-97, \$22,190.60 Tax, \$1,573.33 Penalty, Failure to File
\$ 542.06 Penalty, Negligence

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For Petitioner: No Appearance
For Sales and Use Tax Department: Kevin Hanks, Hearing Representative
Action: The Board deferred consideration of this matter.

Joseph Moustafa Eldam, SR CHA 99-319320; 37199
1-1-96 to 9-30-98, \$2,701.78 Tax

For Petitioner: No Appearance
For Sales and Use Tax Department: Carla Caruso, Counsel
Action: The Board took action.

Raymond A. Frausto, SR KH 99-811144; 31171

4-1-96 to 3-31-99, \$30,495.30 Tax, \$3,067.06 Penalty, Negligence

For Petitioner: Luz Frausto
For Sales and Use Tax Department: Kevin Hanks, Hearing Representative
Contribution Disclosures pursuant to Government Code Section 15626: No contributions were disclosed.

Issues: Whether the evidence supports an increase in the audited cost of exempt food sales.

Whether the audited amount of self-consumed taxable merchandise is excessive.

Whether relief from the 10 percent penalty for negligence is warranted.
Action: Upon motion of Mr. Parrish, seconded by Mr. Andal and unanimously carried, Mr. Parrish, Mr. Klehs, Mr. Andal and Ms. Mandel voting yes, Mr. Chiang absent, the Board ordered that the negligence penalty be deleted otherwise the petition be redetermined as recommended by the Appeals Section.

Gary Gouker, SR GH 26-781313; 89000671920

10-1-94 to 12-31-97, \$9,243.07 Tax, \$00.00 Penalty, Negligence

For Petitioner: Gary Gouker
Gary Kelsay, Account P.O.A.

For Sales and Use Tax Department: Kevin Hanks, Hearing Representative
Contribution Disclosures pursuant to Government Code Section 15626: No contributions were disclosed.

Issues: Whether the markup method is an appropriate audit approach.
Whether an adjustment is warranted for employees taking merchandise and cash receipts.

Whether sufficient allowance has been given for self-consumption.
Action: Upon motion of Mr. Klehs, seconded by Mr. Parrish and duly carried, Mr. Parrish, Mr. Chiang, Mr. Klehs and Mr. Andal voting yes, Ms. Mandel voting no, the Board ordered that the disputed measure of tax be reduced by 50 percent.

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Edward G. Staiger, SR ARF 99-201723; 89002144920, -910
1-1-93 to 6-30-95, \$17,708.73 Tax, \$1,772.42 Penalty, Negligence
\$ 0.00 Penalty, Fraud

For Petitioner: Edward G. Staiger

For Sales and Use Tax Department: David H. Levine, Counsel

Action: The Board deferred consideration of this matter.

FINAL ACTION ON APPEALS HEARD JULY 31, 2001

Upon motion of Mr. Andal, seconded by Mr. Klehs and unanimously carried, Mr. Parrish, Mr. Chiang, Mr. Klehs, Mr. Andal and Ms. Mandel voting yes, the Board ordered that the appeal of *Wayne M. Fischer, 94355*, be denied.

Upon motion of Mr. Andal, seconded by Mr. Klehs and unanimously carried, Mr. Parrish, Mr. Chiang, Mr. Klehs, Mr. Andal and Ms. Mandel voting yes, the Board ordered that the appeal of *Donald C. Marro & Lillian S. Clancy, 83206*, be denied.

Upon motion of Mr. Andal, seconded by Mr. Klehs and unanimously carried, Mr. Parrish, Mr. Chiang, Mr. Klehs, Mr. Andal and Ms. Mandel voting yes, the Board ordered that the appeal of *OMH, Inc., Michael S. & Judy L. Ovitz, Robert F. & Janice R. Goldman, Ronald M. Meyer & Kelly R. Chapman, William M. & Carole L. Haber, Raymond & Lynette A. Kurtzman, Stanley & Audri I. Tendler, 90784, Leon J. Condon & Estate of Joan J. Condon, Deceased, Lance A. & Karyn B Tendler, Morris H. Levitt & Estate of Faye H. Levitt, Deceased, Jerome & Linda Janger, Pat Goldberg, Custodian for Brandon Goldberg, Heather Goldberg, J.H. Rowland Perkins II & Sallie Perkins, 90784*, be denied.

The Board adjourned at 4:40 p.m.

The foregoing minutes are adopted by the Board on October 25, 2001.